

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NIVEDITA T. KULKARNI,

Plaintiff,

-v-

ACTAVIS GENERICS, ET AL.,

Defendants.

22 Civ. 5735 (PAE) (BCM)

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

In this diversity action, *pro se* plaintiff Nivedita T. Kulkarni brings failure to warn claims under New York law against five affiliated pharmaceutical defendants. She claims that she developed functional myoclonus from taking the generic drug prednisone, produced by the defendants, and that the drug's label did not disclose this side effect. *See* Dkt. 1 at 12–13. On August 22, 2022, the Court referred this case to the Hon. Barbara C. Moses, Magistrate Judge, for general pretrial management. Dkt. 2.

Three motions are now pending: (1) a motion to dismiss the complaint for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6), filed by defendants Actavis Generics, Actavis Laboratories FL, Inc., Actavis Laboratories UT, Inc., and Teva North America, Dkt. 21; (2) a motion to dismiss the complaint for lack of jurisdiction, pursuant to Rules 12(b)(2) and 12(b)(5), filed by defendant Teva Pharmaceutical Industries Ltd., Dkt. 23; and (3) Kulkarni's motion for leave to file an amended complaint, Dkt. 37. Along with her proposed amended complaint, Kulkarni has filed an opposition to the motions to dismiss, Dkt 38; defendants have filed a combined reply supporting dismissal and opposing granting leave to

amend, Dkt. 44; and Kulkarni has filed a reply in support of her motion for leave to amend. Dkt. 46.

On September 8, 2023, Judge Moses issued a Report and Recommendation, recommending that the Court (1) grant the motions to dismiss the complaint, on the grounds that personal jurisdiction is lacking over defendant Teva Pharmaceutical Industries Ltd., and that Kulkarni's remaining claims are preempted by federal law, and (2) deny Kulkarni's cross-motion to amend the complaint. *See* Dkt. 49 (the "Report") at 1. On September 21, 2023, Kulkarni filed objections to the Report.

For the following reasons, the Court adopts the Report in its entirety.

DISCUSSION

In reviewing a Report and Recommendation, a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). When specific objections are timely made, "[t]he district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *see also United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). "To accept those portions of the report to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record." *Ruiz v. Citibank, N.A.*, No. 10 Civ. 5950 (KPF) (RLE), 2014 WL 4635575, at *2 (S.D.N.Y. Aug. 19, 2014) (quoting *King v. Greiner*, No. 02 Civ. 5810 (DLC), 2009 WL 2001439, at *4 (S.D.N.Y. July 8, 2009)); *see also, e.g., Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

If a party objecting to a Report and Recommendation makes only conclusory or general objections, or simply reiterates its original arguments, the Court will review the Report strictly

for clear error. *See Dickerson v. Conway*, No. 08 Civ. 8024 (PAE), 2013 WL 3199094, at *1 (S.D.N.Y. June 25, 2013); *Kozlowski v. Hulihan*, Nos. 09 Civ. 7583, 10 Civ. 0812 (RJH) (GWG), 2012 WL 383667, at *3 (S.D.N.Y. Feb. 7, 2012). This is so even in the case of a *pro se* plaintiff. *Telfair v. Le Pain Quotidien U.S.*, No. 16 Civ. 5424 (PAE), 2017 WL 1405754, at *1 (S.D.N.Y. Apr. 18, 2017) (citing *Molefe v. KLM Royal Dutch Airlines*, 602 F. Supp. 2d 485, 487 (S.D.N.Y. 2009)). Furthermore, “[c]ourts do not generally consider new evidence raised in objections to a magistrate judge’s report and recommendation.” *Tavares v. City of New York*, No. 08 Civ. 3782 (PAE), 2011 WL 5877548, at *2 (S.D.N.Y. Nov. 23, 2011) (collecting cases).

Kulkarni’s only objection reiterates an argument made before and addressed by Judge Moses in her well-reasoned Report. She contends that her state-law claims are not preempted by federal law, contrary to the conclusion Judge Moses drew based on controlling Supreme Court precedent, *see PLIVA, Inc. v. Mensing*, 564 U.S. 604, 609 (2011). Kulkarni’s objection argues that defendants’ prednisone label differed from that of the “reference-listed drug” and that the generic prednisone was thus “misbranded” under federal law, *see* Dkt. 50 at 1–2.

Judge Moses, however, considered and rejected this very argument in the Report, *see* Report at 13, and persuasively so, in this Court’s assessment. Because Kulkarni’s sole objection merely restates an argument already made before Judge Moses, this Court reviews the Report’s reasoning for clear error. *See Dickerson*, 2013 WL 3199094, at *1–2; *Kirk v. Burge*, 646 F.Supp.2d 534, 539 (S.D.N.Y.2009). This Court finds no such error in Judge Moses’s characteristically thoughtful and well-reasoned Report. The Court accordingly adopts the Report in full, both insofar as it recommends granting the motion to dismiss and as it recommends denying the motion for leave to amend as futile. The dismissal of Kulkarni’s claims against defendant Teva Pharmaceutical Industries, Ltd., which is based on Rule 12(b)(2),

is without prejudice. The dismissals of Kulkarni's other claims, which are based on Rule 12(b)(6), are with prejudice.

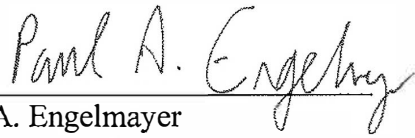
In so holding, the Court does not minimize the suffering Kulkarni describes. However, for the reasons explained in the Report, legal relief is unavailable on the claims as brought.

CONCLUSION

For the foregoing reasons, the Court accepts and adopts Judge Moses's September 8, 2023 Report and Recommendation in its entirety, dismisses the complaint, and denies Kulkarni leave to amend.

The Court respectfully directs the Clerk of the Court to close this case and mail a copy of this decision to the plaintiff at the address on file.

SO ORDERED.


Paul A. Engelmayer
United States District Judge

Dated: September 27, 2023
New York, New York